No. 3876

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

EWA PLANTATION COMPANY,
an Hawaiian Corporation,
Plaintiff-in-Error,

vs.

CHARLES T. WILDER,
as Tax Assessor for the First Taxation Division, Territory of Hawaii,
Defendant-in-Error.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

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By ...., Deputy Clerk.

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STATEMENT.

Upon the Statement of the Case in the brief of Plaintiff in Error, three questions are presented for the determination of this court:

I. Whether this Court will accord controlling weight to the construction of the local tax statutes by the Territorial Supreme Court, and so will affirm the judgment rendered by that court in this cause;

II. Whether the judgment of the local court that the receipts of plaintiff in error for strike losses determined by the decrease estimated in taxable net profits arising from the strike were taxable as income for 1920 under the Hawaiian statute is so clearly wrong as to require reversal at the hands of this court;

III. Whether the judgment of the Hawaiian court that income from securities purchased and held for safe-keeping in California until sold was income derived from property owned in Hawaii and taxable under the Hawaiian statute is so clearly erroneous as to require reversal at the hands of this court.

ARGUMENT.

I.

It will be observed by the court that this writ of error is to review a decision of the Territorial Supreme Court based entirely upon a construction of the tax laws of the Territory.

THE FEDERAL APPELLATE COURT WILL NOT DISTURB THE DECISION OF THE TERRITORIAL SUPREME COURT INTERPRETING A LOCAL LAW, UNLESS THERE IS CLEAR ERROR.

While this court has, of course, full power to reverse the Territorial Supreme Court in any case that is brought up upon appeal or writ of error, it is the rule of action of the appellate court, long sanctioned

and established, that only upon conviction of clear error will it disturb the finding of the local court upon matters of local law.

Cardona v. Quinones, 240 U. S. 83, 88.

Martinez v. Mendez, 256 Fed. 596.

The court will not reverse unless there is "manifest error."

Treat v. Grand Canyon Ry. Co., 222 U. S. 448, 452.

English v. Arizona, 214 U. S. 359.

Santa Fe County v. Coler, 215 U. S. 296.

The "settled rule" of the Supreme Court of the United States is to accept the construction placed by a Territorial court upon a local statute and not to disregard the same unless constrained to do so by the "clearest conviction of serious error."

Work v. United Globe Mines, 231 U. S. 595, 599.

The construction of a local statute by the local Territorial court "is of great if not controlling weight."

Lewis v. Herrera, 208 U. S. 309, 314.

The views of the Territorial court are "very persuasive" on the United States Court as to the construction of local statutes.

Crary v. Dye, 208 U. S. 515, 519.

Thus, even where the Territorial court in construing the statute in question ignored the rule of statutory interpretation, which demands that when a statute is copied from another state, the interpretation which had theretofore been placed upon that statute is regarded as transplanted also, the Su-

preme Court of the United States affirmed the construction of the Territorial court.

Copper Queen Mining Co. v. Arizona Board, 206 U. S. 474, 479.

APPLICATIONS OF THE RULE IN APPEALS FROM THE SUPREME COURT OF HAWAII.

The rule that the construction by the local court of local law is of great if not controlling weight with the appellate court has been applied both by the Supreme Court of the United States, and by this court in passing upon appeals from Hawaii.

Thus, this court has affirmed the construction by the Territorial Supreme Court of Territorial statutes.

Hawaii County v. Halawa Plantation, 239 Fed. 836, 839.

Castle v. Castle, 281 Fed. 609, 612.

The Supreme Court of the United States has affirmed the local construction of the local law of Hawaii in the following cases:

Kealoha v. Castle, 210 U. S. 149.
Cotton v. Hawaii, 211 U. S. 162.
Lewers & Cooke v. Atcherley, 222 U. S. 285.
Kapiolani Estate v. Atcherley, 238 U. S. 119.
John Ii Estate v. Brown, 235 U. S. 342.

THE ISSUES PRESENTED TO THIS COURT IN THE INSTANT CASE ARE ESSENTIALLY MATTERS OF LOCAL LAW, AND THE CONSTRUCTION OF THE LOCAL SUPREME COURT IS ENTITLED TO GREAT, IF NOT CONTROLLING, WEIGHT.

Taxation laws are essentially local in their nature, as the provisions for taxation in every state, territory or municipality differ from others as a rule, according to the necessities of the different communities and the temper of the different law-making bodies.

"No question is more clearly a matter of local law than one arising under the tax laws."

Lewis v. Monson, 151 U. S. 545, 549.
Bardon v. Improvement Co., 157 U. S. 327, 331.

This very court, in a decision construing a tax law of Hawaii rendered no later than June 5, 1922, adhered to this "settled rule" of decision, saying:

"The questions thus involved call for the construction of the local territorial statute, and while this court is, of course, not precluded from reviewing the ruling of the Supreme Court of the Territory as it would a decision of a state Supreme Court under similar circumstances, it naturally will lean toward the interpretation adopted by that court, and will not be disposed to disturb the decision unless there is clear error. *Fox v. Haarstick,* 156 U. S. 679; *Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization,* 206 U. S. 474; *English v. Territory of Arizona,* 214 U. S. 359; *Clason v. Matko,* 223 U. S. 646. And no such error appears in the instant case."

Castle v. Castle, 281 Fed. 609, 612.

The principle has been affirmed in the following cases dealing with Territorial tax statutes.

Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization, supra.
English v. Territory of Arizona, supra.
Treat v. Grand Canyon Ry. Co., supra.
Santa Fe County v. Coler, supra.

It is respectfully submitted that the issues before the court in the instant case fall within the same category as did the Castle case; and that the decision of the Territorial Supreme Court interpreting Sections 1306 and 1307, R. L. Hawaii, 1915, concerning taxation should receive the same affirmance from this court as it rendered when the Hawaiian Supreme Court interpreted R. L. Hawaii, 1915, Section 1323, concerning taxation in the Castle case, just cited.

II.

While the statement of the plaintiff in error on the strike losses is, in the main, correct, yet one very significant feature in the Submission of this point (Record p. 3) was omitted from that statement. It appears that the losses underwritten by the Hawaiian Sugar Planters' Association were to be determined in amount "by the decrease estimated in taxable net profits arising from or due to the disturbed labor conditions." Thus the proposition set forth by Ewa Plantation in its brief (Brief pp. 11 and 12) that "it could not be known in the year 1920, therefore, whether the compensation moneys were merely a return of capital or partly a return of capital and partly profit" and "the assessor had not the power 'to convert a sum received—as compensation for damages caused by the laborers' strike' wholly into a profit upon which the taxpayer should pay income tax" has not the same force that it would have in the absence of this feature of the Submission. Since

the contributions made through the Hawaiian Planters were determined by an estimated decrease in taxable net profits, that determination should certainly characterize the contribution. It was a present payment in liquidation of present and future profits foregone, and certainly cannot be considered as compensation for capital, or, indeed as anything but a present realization of taxable profits.

THE STRIKE LOSSES.

The question presented is whether the contributions of the Hawaiian Sugar Planters' Association, an organization comprising every sugar plantation and mill company in the Territory, to Ewa Plantation, in liquidation of the losses sustained by Ewa Plantation in connection with fighting the labor strike on that plantation, the amount of the contribution being determined by the estimated decrease in taxable net profits of Ewa arising from or due to the disturbed labor conditions should be apportioned as income received during 1920, 1921 and 1922, or should be taxed as income for 1920, the year in which it was actually received. The contention of the taxpayer is that it should be apportioned over the three years. The contention of the Territory is that it was income taxable entirely during the year 1920. The determination of the controversy rests entirely in the interpretation of the following Hawaiian statutes on taxation and upon the Hawaiian decisions construing those statutes.

"Sec. 1306. On corporation income. There shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of two per cent. on the net profit or income above actual operating and business expenses derived during each taxation period, from all property owned, and every business, trade, employment or vocation, carried on in the Territory of Hawaii, of all corporations, doing business for profit in the Territory, no matter where created and organized; provided, however, that nothing herein contained shall apply to corporations, companies or associations, conducted solely for charitable, religious, educational or scientific purposes, including fraternal beneficiary societies, nor to insurance companies, taxed on a percentage of the premiums under the authority of another law."

"Sec. 1307. Income includes what. In estimating the gains, profits and income of any person or corporation, there shall be included all income derived from interest upon notes, bonds and other securities, except such bonds of the Territory of Hawaii or of municipalities created by this Territory, the principal and interest of which are by the law of their issuance exempt from all taxation; profits realized within the taxation period from sales of real estate, including leaseholds purchased within two years; dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended in the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance, and all other gains, profits and income derived from any source whatsoever during said taxation period."

The contention of the taxpayer expressed in simple terms is this: that the provision of Section 1307 providing that "in estimating the gains, profits and

income of any person or corporation there shall be included * * * the amount of sales of all movable property less the amount expended in the purchase or production of the same * * * and all other gains, profits, and income derived from any source whatsoever during said taxation period" establishes a method of taxation based upon the "crop system" of raising sugar in Hawaii whereby in returning the profits realized from the sale of each of the three annual crops which are growing at the same time, the amounts expended in the production of each crop, whether expended in the year of the sale or in the two years preceding its maturity, are to be deducted from the amount of that sale in determining the taxable income; that this contention is supported by the case of *Tax Assessor v. Laupahoehoe Sugar Company,* 18 Haw. 206, and the *Income Tax Appeal* Cases, 18 Haw. 596, and that finally contributions of money to reimburse the plantation for expenses incurred in fighting a labor strike properly come within the words of the statute "less the amount expended in the purchase or production" of the sugar crop.

It is true that nowhere does the taxpayer state baldly that contributions toward fighting the strike are "amounts expended in the purchase or production" of movable property, to-wit: sugar cane. It characterizes the statute and the decisions above cited as "establishing a crop system of accounting" and thereby seeks to include within the wording of

the statute all expenses which it may arbitrarily assign to the three yearly crops which may be growing at the time the expenses occur or the contributions are received.

The contention of the Territory is that in deducting amounts from the profits of the sales, or in classifying moneys received as amounts of sales, of all movable property, such sums must come within the meaning of the phraseology of the statute; that contributions of other interested parties toward fighting a strike can in no sense be regarded either as "the amount of sales of all movable property" nor can they be regarded as "an amount expended in the purchase or production of the same" nor even—to go to the furtherest length with the taxpayer—can they be regarded as reimbursements for the amounts expended in the purchase or production of such movable property; that since they come neither within that portion of the statute just quoted, nor within the other designated sources, these contributions properly come within that phrase of the statute which defines as taxable income "all other gains, profits and income derived from any source whatsoever during said taxable period" and that they must therefore be assessed as taxable income for the year, or taxable period, in which they were received, to-wit: 1920.

THE STRIKE LOSS RECEIPTS WERE NEITHER "AMOUNTS EXPENDED IN THE PURCHASE OR PRODUCTION" OF "MOVABLE

PROPERTY" SOLD NOR WERE THEY REIMBURSEMENTS FOR AMOUNTS EXPENDED IN THE PURCHASE OR PRODUCTION OF MOVABLE PROPERTY SOLD.

Chapter 4, Sec. 9, R. L. 1915, Hawaii, on the construction of laws provides that the words of a law are generally to be understood in their most known and used signification without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.

It is submitted that not merely the general and popular meaning but the only possible meaning of the phrase "the amount of sales of all movable property less the amount expended in the purchase or production of the same" excludes a receipt of moneys contributed under contract as a share in fighting a labor strike, the amount being determined by the decrease in taxable profits of the strike-fighting company during the period of the strike. The amount, it will be observed, is not determined by a diminution in the amount of sale price of movable property; it is not determined by amounts expended in the purchase or production of that movable property, the cane. It is determined purely by a loss of profits due to a struggle with striking laborers.

In other words, if it is in any degree akin to what the taxpayer contends, then it is so only because the contribution may be regarded as a reimbursement of the plantation, not for the amount of cane pro-

duced, not for the amounts expended for the purchase or production of that cane, but because it seemed desirable to all the plantations for their future benefit that the plantation upon which the strike occurred should forego its production for a certain time. It is reimbursement perhaps for a diminution in production but certainly not a reimbursement for the production itself.

THE AMOUNT CONTRIBUTED CANNOT POSSIBLY BE REGARDED AS COMING WITHIN SECTION 1308 PROVIDING THAT IN COMPUTING INCOMES THE NECESSARY EXPENSES ACTUALLY INCURRED IN CARRYING ON ANY BUSINESS, TRADE, PROFESSION OR OCCUPATION OR MANAGING ANY PROPERTY SHALL BE DEDUCTED. THE CASES IN 18 HAWAIIAN CONSIDERED.

In neither of the two cases in 18 Hawaiian (*Tax Assessor vs. Laupahoehoe Sugar Company,* 18 Haw. 206, *Income Tax Cases,* 18 Haw. 596), relied upon by the taxpayers, was it held that income is to be taxed in any year other than that in which it is actually received. The question in each of those two cases was simply as to the deductibility of certain expenses in a given year and did not relate to the taxability of income in a given year.

The contention of the Territory is consistent with the decision reached in these two cases. It is believed that they were correct construction of those portions of the tax statutes then before the court for consider-

ation. In each of those cases the income returned was that received by the taxpayer from the sales of movable property, to-wit: its crops of cane and yields of sugar; and the sole question was as to what expenditures were deductable from the gross income received from those sales.

It was held in the one case (*Tax Assessor v. Laupahoehoe Sugar Co.,* supra) in which the taxable income was that received during a certain six-months taxation period, that moneys expended prior to that taxation period *in the production of the same sugar* was deductible, and in the other cases, *Income Tax Appeal Cases,* supra), in which the taxable income was that received in the year 1906 from the crop of 1906, that moneys paid out in 1906 upon the crop to be harvested in 1908 was not deductible.

Those two decisions were required by the words of the statute. They related to the provision of the statute (now R. L. Sec. 1307) that in taxable income there should be included "the amount of sales of all movable property, less the amount expended in the purchase or production of the same." In each of these cases the taxable income, without dispute was derived from sales of movable property. Under these circumstances, the language of the statute was clear that any amount expended in the production of that movable property should be deducted and equally clear that any amount not expended in the production of that particular property was not deductible under that particular provision.

In the case at bar, however, the moneys received did not come from the sales of movable property whether cane or sugar or anything else. They were therefore,—not falling within any of the other enumerated sources of income in the statute,—properly held to be "other income derived from any source whatsoever," and taxable for the period in which it was actually received.

Moreover, this court will follow the Territorial court's construction of these cases, made in the case at bar (Record p. 32).

> *Territory of Hawaii v. Hutchinson Sugar Co.,* 272 Fed. 856, 859.

The various sections of the income tax statutes all consistently provide that income shall be taxable in the year in which it is "derived" or "realized" or "acquired" (these terms are all synonyms,—see *Wilder v. Trust Company,* 20 Haw. 589).

There seems to be no room for argument on this subject. In Section 1306, and 1307, which are the sections directly involved in the case at bar, the provision is that the tax shall be leviable on the net profit or income "derived during each taxation period." The taxation period is clearly defined in Section 1305, as being "the year immediately preceding the first day of January of each year in which said tax is payable," and in Sec. 1307 the provision is that "in estimating the gains, profits and income," there shall be included all income derived from cer-

tain stated sources not now material "and all other gains, profits and income derived from any source whatsoever during said taxation period."

The language is wholly unambiguous; the taxable income is the income derived or received "during each taxation period."

THE DECISIONS OF THE HAWAIIAN COURT HAVE NEVER ESTABLISHED A "CROP SYSTEM" OF ACCOUNTING, AS CONTENDED BY THE TAXPAYER.

That court has not at any time held that income due during the taxation period but not actually received is taxable as income of that year or that income received during the taxation period is not taxable in January or February following, because under the "crop system" or under some other system of bookkeeping the income is treated as income of some earlier or of some later year.

It is respectfully submitted that the language of the United States Supreme Court used in a case where an Insurance company was seeking to have premiums already paid allocated for income tax purposes to different years than that in which the premiums were paid, upon the ground that the premiums were still in the hands of the agents, applies with peculiar force to the present case.

"Only imperative language in the statute would justify a construction which would place it in the power of the claimant, by private contract with its agents, to shift payment of taxes from one taxing year to another."

Maryland Casualty Co. v. United States, 251 U. S. 342, 347.

In the case at bar the taxpayer seeks to shift payment of taxes from one taxing year to another, by a bookkeeping system which would return moneys actually received and available for all corporate purposes in one year, as income for another year. Not only is there no "imperative language in the statute" which would "justify" this attempt, but the wording of the statute is clear that such sums shall be taxed as income for the year in which they are received.

When income is actually received, with liberty for full beneficial enjoyment, it is taxable as income for the year when it is received and cannot be delayed in its payment of the tax in order to conform to some particular system of bookkeeping.

Even if, therefore, it were the fact, as it is not, that the sum of $133,706.29 was received by the Ewa Plantation Company on December 31, 1920, as a payment in advance for sugar to be produced and sold in 1921, still that would not make that amount nontaxable as income of 1920. The command of the statute would still be imperative, that since the income was received in 1920 it was taxable as income of 1920.

The only question which arises is as to the taxability of income as income of the year in which it was received. It should be borne in mind throughout this portion of the case that the $2,791,697.72 receiv-

ed by the Ewa Plantation Company was received by it not in payment of movable property which it had sold or expected to sell, but in compensation for its inability to produce property at all or for its inability to produce a portion of its crop at as low a cost as it was accustomed to produce it.

It does not follow at all from the ruling in the two cases in 18 Hawaiian under the particular circumstances of these cases, that certain expenses of a prior period were deductible in a later period, that income actually received in one year is taxable as income of another year. The rulings in 18 Hawaiian were covered by the requirements of the plain language of the statute governing what should be de-
of the statute governing what should be deducted in
ducted in determining taxable income. The suggestion that income actually received in one year should not be taxable as income of that year, but should be taxed as income of another year, is not only not required by the phrasing of the statute, but would be in absolute violation of the statutory requirement that "there shall be levied, assessed, collected and paid annually * * * a tax of two per cent on the net profit or income above actual operating and business expenses derived during each taxation period * * *" and that in estimating that net profit or income there shall be included "all other gains, profits and income derived from any source whatsoever during said taxation period."

THE TAXPAYER IS ESTOPPED TO CLAIM THAT THE STRIKE CONTRIBUTION IS NOT INCOME FOR 1920, AND TO CLAIM THAT THE "CROP SYSTEM OF ACCOUNTING" APPLIES, FOR IT RETURNED ITS OWN PRO RATA CONTRIBUTION TO THIS VERY FUND AS AN EXPENSE ENTIRELY CHARGEABLE TO 1920.

But there is a further reason why the ruling of the Supreme Court of Hawaii was wholly correct in denying the taxpayer's claim to distribute its reimbursement of strike losses over three annual crops. That is, that the taxpayer in deducting its expenses for the year 1920, *deducted the entire amount of Ewa Plantation Company's pro rata share in the contribution* (Record, p. 4) *as an expense chargeable in* 1920.

It requires little argument to show that if the strike loss contributions were to be chargeable under the "crop system of accounting" which would appropriate a portion of them to each of three annual crops, that Ewa's share of disbursement as well as its share of receipts should be accounted for in the same manner, and charged proportionately to each of three annual crops.

We submit that the company's own return stamps the claim that the receipts should be apportioned to each of three annual crops as a trifle inconsistent. It is a well-recognized and established rule of tax law, that the taxpayer by the form of his return may estop himself to contradict his return in the nature, title and value of his property.

37 Cyc. 994.
Dull v. Le Fevre, 222 Fed. 471, 474.
In re Bushnell, 215 Fed. 651, 654.
Union School Dist. v. Bishop, 76 Conn. 695, 66 L. R. A. 989.

It is submitted that when the taxpayer characterizes strike contributions *when made by itself,* as being chargeable wholly against the taxable year 1920, and as not being subject to the "crop system of accounting," it is estopped to claim that it should be apportioned to three annual crops, under the "crop system of accounting" and not be chargeable to the taxation period of 1920, *when received by itself.*

The deduction of Ewa contribution was correctly claimed and correctly allowed as a deduction from the income of the year 1920, because it was not paid out as a part of the cost of the production of those three crops, or of any crop or crops and because it was paid out in pursuance with the contract and agreement with the Association as one of the means of obtaining this "other income derived from any source whatsoever," to wit: the sum of $2,791,697.72.

III.

INTEREST ON MAINLAND INVESTMENTS.

The second point raised by plaintiff-in-error is as to the correctness of the opinion and judgment of the court below on the question as to whether interest received by the plaintiff-in-error during the year 1920 on the bonds and notes of mainland railroad and industrial corporations and upon deposits in mainland banks was or was not legally deductible

in its tax return of 1921 in ascertaining its taxable income. (Record, pp. 33-48). This point is covered by errors assigned and numbered 3-7, 9 and 10. (Record, pp. 80, 81).

The agreed facts showed:

That ever since the incorporation of Ewa Plantation Company, Castle & Cooke, Limited, a Hawaiian corporation, has been its general agent at Honolulu, and for upwards of twenty years last past Welch & Company, a California corporation, has been the agent at San Francisco of said Castle & Cooke, Limited; that at all times during said period the sugar produced by the Ewa Plantation Company has been sold on the mainland of the United States and the proceeds of sale have been received by Welch & Company and deposited by it in California banks, and credited on its books to Castle & Cooke, Limited, for account of Ewa Plantation Company; that against said credit the Ewa Plantation Company has drawn, from time to time as needed, moneys required by it for the payment of expenses of its plantation and dividends upon its stock; that bonds and notes of foreign (mainland) railroad and industrial corporations were purchased by Welch & Company with the surplus moneys of the Ewa Plantation Company so held as aforesaid by the former Company and the said bonds and notes thereafter, until they were sold on the mainland, remained on deposit with said Welch & Company and none of said bonds and notes, or the proceeds with which they were purchased, have

been held in said Territory, nor have they been physically present therein at any time;

That the Ewa Plantation Company after including it in Schedule A of its return deducted the interest accruing to it from these investments during the year 1920 in its Territorial income tax return of 1921, by including it in Schedule B, (Record, pp. 16, 18), and that the Territory, acting through its tax assessor, disallowed such deduction; and

That at no time heretofore has the Territory considered income derived from such investments as taxable income or included such in assessing the incomes of corporations or individuals under the laws of the Territory. The issue raised is: Is interest accruing from such bonds, notes and bank deposits properly deductible prior to arriving at taxable net income under the Territorial Income Tax Act?

CONSTRUCTION OF THE ACT.

As the income in question was not received "from any business, trade, employment or vocation carried on" in Hawaii, the statute may be regarded as though it read ,"There should be levied a tax on the income from all property owned in Hawaii." The question then arises as to whether the securities, bonds, notes and bank deposits referred to in the submission are property owned in Hawaii.

It is true that the Territory did not rely before the Supreme Court of Hawaii upon the fact that the wording of the statute refers to the ownership being

in Hawaii rather than the property, but as it is proper that a decision should be supported upon any sound basis, even though the principal upon which it was decided was incorrect, it is deemed proper to urge the point before this court. (*Sullivan v. Iron Silver Mining Co.,* 143 U. S. 431).

The Supreme Court of the Territory of Hawaii (Record, pp. 37, 38), uses the following language on the construction of the word "owned":

"At the very outset counsel for the Territory concede that the phrase 'owned in Hawaii' as employed in Section 1306 must be taken as referring to the property and not the owner and the final form of the question is, 'Are these bonds and deposits in Hawaii,' and that 'the case stands as though the statute read "income from property in Hawaii owned by the taxpayer."' We are not as ready as counsel to accept this construction of the meaning of the statute. It seems to us that it could be strongly argued that the phrase 'property owned in Hawaii' has reference to the place of ownership and not to the location of the property. We are referred to the rule that in the construction of a statute the language employed should be taken in its common and usual signification and we are reminded that if a person were asked, 'What property do you own in the Territory?' he would not in answering enumerate bonds and notes of foreign or mainland corporations or deposits in foreign or mainland banks. This may be true, but on the other hand if the San Francisco agents of these corporations were asked in respect to the property in question, 'Where are these bonds, notes or bank credits owned?' the answer obviously would be, 'In the Territory of Hawaii,' and that answer would be entirely correct."

It is submitted that under the authorities already cited to the Court the construction by the local Court of the local statute and its meaning is entitled to the greatest possible weight. If this construction be adopted, of course the question is solved at once favorably to the Territory.

But it is not alone upon the language of the Hawaiian court that the Territory depends. The California court—and we respectfully request that this court have in mind when California cases are cited that the taxpayers are attempting to establish a taxable situs for the securities in California rather than in Hawaii—has defined securities even though physically absent from a State as "owned" in the place where the owner resides.

Estate of Fair, 128 Cal., 607, 613.

Hunter v. Board of Supervisors, 33 Io. 376, 378.

Shares of stock, in the absence of legislation prescribing a different rule are appropriately related to the person of the owner.

Hawley v. Malden, 232 U. S. 1, 12.

It is submitted that there is no straining of language or of the intent of the Legislature in holding that the term "owned in" referred to the concept of ownership of intangibles as following the locality of the person of the owner.

In Section 1305, R. L. 1915, the Legislature has provided for a levy and assessment of a tax on income derived "by every person residing without the Territory from all property owned * * * in the Territory." The argument is made that this conclusive-

ly indicates the intention of the Legislature that property must be physically present in Hawaii before it can be regarded as owned in Hawaii. We submit that this is not necessarily so, that the same distinction might be made properly on the statute in regard to non-residents that the Territory claims in regard to the corporations, namely, that in regard to tangible property, whether real or personal, within the territorial limits of Hawaii, the income therefrom must be taxed by the Territorial Government, whereas, as to intangibles they follow the person of the non-resident owner.

In this connection the Territory desires to call attention to the case of *Rhodes vs. Weldy,* 46 Ohio St., 234; 15 American State Reports, 584, 591, 592, cited by plaintiff-in-error. There the holding of the court was not, as cited by the plaintiff-in-error, that the meaning of language used in statutes should be construed to be the same wherever used. Indeed the court said specifically:

"It would not be a sound proposition to say that the same word occurring in different places in the same statute always means the same thing. It may sometimes call for a radically different construction."

But the Territory does not ask for a radically different construction of the words "owned in" in Sections 1305 and 1306 of the Revised Statutes; it asks for a harmonious construction which shall declare that while tangible property of all sorts is "in" the place where it is physically found that the situs of intangibles follows the person of the owner.

Again adopting that rule of construction which is specifically required in the Courts of Hawaii, R. L. 1915, Section 11:

"Laws in pari materia or upon the same subject matter must be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."

We have the following explanation of what the Legislature intended that corporate income to include. Section 1305 and 1306 provide whose income shall be taxed and the general broad classifications of the sources from which that income shall come. Section 1307 then goes on to explain in greater detail how the income shall be estimated. Reading Secs. 1305 and 1306 the other side asks, does that include bonds and other securities in a case where, although the owners are residents of Hawaii, the papers are on the mainland? The precise answer to this very question is given in Sec. 1307. That Section says that "in estimating * * * the income of any person or corporation *there shall be included all* income derived from interest *upon notes, bonds and other securities,* except such bonds of the Territory of Hawaii or of municipalities created by this Territory, the principal and interest of which are by the law of their issuance exempted from all taxation." The exception stated, of course, does not apply to the case at bar. The naming of one exception, however, does serve to show that no other exception was intended by the legislature. *Enumeratio unius exclusio alterius.* What could be clearer? The legisla-

ture itself, anticipating that questions might arise as to the construction of some of the provisions of the earlier sections, proceeded to give answers to some at least of these questions. It said in unambiguous language that there *"shall be* included" *all* income in Hawaii derived from interest upon notes, bonds and other securities. That means, if it means anything at all, that interest upon all notes and upon all bonds and upon all other securities (excepting those which are specifically excepted) is taxed. We are not asking the court to find in Section 1307 that things are taxed which are not taxed under Sec. 1305 or under Sec. 1306. It is entirely proper for the Legislature to use two sections to express its thought, instead of using one only; just as it is entirely proper for a person to use two or more sentences to express his thought instead of endeavoring to confine himself to one sentence. In stating his meaning a man may use more words rather than fewer words, if he deems it necessary. It is often as difficult for a legislature, as it is for an individual, to express its whole thought in all of its details in one sentence or in one paragraph. It may deem it necessary to use two or more paragraphs or two or more sections. Read as we submit it should be read, there is no inconsistency between Secs. 1306 and 1307; nor is there any enlargement of Sec. 1306 by Sec. 1307. In the case of *Frear vs. Wilder,* 25 Haw. 603, the court found that the reference to gifts in Sec. 1307 would be an enlargement of Sec. 1305, and

that the imposition of the tax was accomplished by Sec. 1305 alone and could not be enlarged by Sec. 1307. The use which we ask to be made of Sec. 1307 in construing Sec. 1306 is not inconsistent with the decision of the court in the Frear case. The language of Sec. 1306, all "property in Hawaii," is broad enough to include the intangible credits under consideration (the owner being domiciled in Hawaii) as well as to include real estate, railroad cars, horses and other tangible personal property physically in the Territory. And if in Sec. 1307 the legislature has given us direct light upon the very question which arises in this case as to whether these bonds and other securities are meant to be included as property in Hawaii, should our eyes be shut to that light? Why should it not be gladly welcomed by the court as rendering its task easier? The catch words adopted by the legislature for the beginning of the section are, "INCOME INCLUDES WHAT". What income? Can there be any doubt about it? Why, certainly, the income which is taxed by Sections 1305 and 1306. And, again, the legislature says that these things which it is about to enumerate in Sec. 1307 shall be included,—when and under what circumstances? Clearly, "in estimating the income," that same income referred to in Sections 1305 and 1306. The legislature has said it. Why should we refuse to heed it? What corporations did it mean? The corporations referred to in Sec. 1305. What gains, profits and income did it mean? The gains,

profits and income of the persons referred to in Sec. 1305 and of the corporations referred to in Sec. 1306. What room is there to doubt this? How can it be said that by reading Sec. 1307 and by absorbing the light which it gives we are enlarging Secs. 1305 and 1306 and taxing something which the two earlier sections do not tax? It is submitted that such a charge would have no foundation.

If, instead of following the method which it has followed, the legislature had added at the end of the first paragraph of Sec. 1305 and again just before the word "provided" in the middle of Sec. 1306 the following words: "In estimating the gains, profits and income which we are in this paragraph talking about we mean that there shall be included all income derived from interest upon all notes, bonds or other securities except those issued by our Territory or its municipalities," could it be successfully argued for a moment that this addendum in each section could not serve to explain the meaning of the preceding words or to show that the legislature did mean to tax all bonds and securities wherever the physical evidences thereof were situated? Such a position would be altogether untenable, it is respectfully submitted. What difference can it make whether the explanatory words appear in another section instead of in the same section? All writers upon analogous subjects would say that it makes no difference. In other words Sec. 1307 is to the extent here mentioned the legislature's own dictionary of the

language which it has used in Sec. 1305 and 1306. It had a right to use such a dictionary and to furnish it in advance to all litigants and to all courts.

THE LEGISLATIVE INTENT

Plaintiff-in-error has called upon the rule of construction that tax statutes shall be strictly construed against the government. While that is true as a general proposition, it is not recognized as extending to a point where the intention of the legislature should be perverted in order to exempt a large class of property from taxation.

"It may be conceded that no tax can be levied without express authority of the law, but the statutes are to receive a reasonable construction with a view to carrying out their purpose and intention."

Scottish Union and Nat. Ins. Co. vs. Bowland, 196 U. S., 611, 629.

It is an old and well-recognized rule of construction that the intent of a legislature shall be controlling upon the courts in construing statutes. This rule is adopted for Hawaii by Section 12, R. L. 1915:

"One of the most effectual ways of discovering the true meaning of the law when its expressions are dubious is by considering the reason and spirit of it or the cause which induced the legislature to enact it."

On the purpose of the law and the intention of the legislature in enacting it, we feel that the Territory's position can be most lucidly expressed in the language of a Federal case. The citation of this authority is the more satisfactory, as plaintiff-in-error accepts it unquestioningly:

"Great weight and due deference is always given to departmental or other executive construction of laws. The acceptance of such construction is, however, always limited by the thought that the imposition of a tax is a legislative and not an executive act, and we are brought back again to the judicial construction of the statute. *A like observation may be made with respect to the thought that Congress must have intended this law to yield revenue, and because of this should be given such a construction as will advance the purpose and not nullify it.*"

De Ganay v. Lederer, 239 Fed. 571-2.

"The law should be construed as a whole in order to determine the intention of the legislature—the real end sought in all interpretation of statutes."

Assessor v. Oahu College, 15 Haw 18.

STATUTES IN PARI MATERIA.

Plaintiff-in-error, on page 37 of its brief, has attempted to construe the taxation statute as applying only to personal property, the physical evidences of which are in the Territory, by calling in aid Section 6, R. L. 1915, providing that the property of all such persons, while such property is in the Territorial jurisdiction of this Territory, is also subject to the laws.

Counsel contend that Territorial jurisdiction refers to physical boundaries rather than the power and dominion of law jurisdiction, and thus attempt to restrict the operation of a tax law to property physically within that physical boundary of the Territory.

Counsel argue in a circle. Even accepting their construction of Section 6 as referring to physical

boundary of the Territory, there still remains the question as to whether intangible property in theory of law so follows the person of the owner as to be within the physical boundary of the owner's residence.

"It has always been the primary and fundamental rule that no sovereignty or taxing district could exercise the power of taxation, except as to property actually or constructively within its jurisdiction * * * Our Constitution, therefore, in declaring that property shall be taxed *where situated* has done no more than declare the common law rule. The purpose of the Constitution in declaring that property should be taxed in the country *where situated* was really to define the general jurisdiction unit for the exercise of the taxing power, and to confine the exercise of that power to the subjects of taxation within that unit. It did not define what was meant by the words 'where situated'. Since it had reference to the taxing power, it evidently meant property *where situated* for the purposes of taxation under the general principles of law as then understood. *County Treasurer v. Webb & Harrison,* 11 Minn. 500; *San Francisco v. Lux,* 64 Cal. 481; *Johnson v. Oregon,* 2 Or. 327; *San Francisco v. Mackey,* 22 Fed. 602, 607."

Great Southern Life Ins. Co. v. Austin, Tex., 243 S. W. 778, 780.

Westinghouse Electric & Mfg. Co. v. Los Angeles County, Cal., 205 Pac. 1076.

But the construction by the Hawaiian court of this statute (Section 6) affords no support to plaintiff-in-error, for in *Carter v. the Insurance Co.,* 10 Haw. 562, 570, the court indicated that Mrs. McGrew, although physically present in California, was within the Territorial jurisdiction of Hawaii by virtue of her husband's domicile.

CONTEMPORANEOUS CONSTRUCTION

It has never been questioned by the Territory that the construction by executive officers of a law is entitled to respectful consideration, but it is denied that such a construction is controlling. At page 47, Record, the Supreme Court of the Territory says:

"But the rule which gives determining weight to contemporaneous construction put upon the statute by those charged with its execution applies only in cases of doubt and ambiguity. Courts will ordinarily make use of the contemporaneous construction of a statute by executive and administrative officials as an aid to interpretation, but an erroneous construction can never be binding on the judiciary."

Where exemptions are claimed, the omissions of the taxing officers of a state in previous years to assess the property cannot control the duty imposed by law upon their successors, or the power of the legislature or the legal construction of the statute under which the exemption is claimed.

Vicksburg, Etc., R. Co. v. Dennis, 116 U. S. 665, 670.

Yazoo Ry. Co. v. Thomas, 132 U. S. 174, 185.

Wells v. Savannah, 181 U. S., 531.

THE EARLY HAWAIIAN CASES ON THE TAXATION OF PERSONALTY.

In the case of *H. Hackfeld & Co.* 3 Haw. 292, the question was whether money and merchandise which were actually in the United States and Europe were taxed by the statute of Hawaii. The statute under consideration was that imposing a direct tax upon personal property and it was held not to include

within its terms tangible personal property (money and merchandise) which were in the United States and Europe. The statute there under consideration was sufficiently clear in its language to show that the intention of the legislature was to exclude money and merchandise not within the Territory. For example, it taxed only those moneys which were "in hand." It did not even tax moneys in a bank in Hawaii, let alone moneys in Europe. The decision was doubtless correct in so far as the precise question before the Court is concerned; but when the Court said that the maxim as to the situs following the owner "cannot become fact as applicable to taxation, except by legislative enactment," the statement was not required by the facts of the case, (because in that particular case there was a statute which, as construed by the Court, prevented the application of the maxim) was in other words *obiter dictum* and was certainly contrary to all of the reported cases that we know of. Not even the cases cited by plaintiff-in-error go as far as to say that the maxim or principle cannot be adopted in any case except by legislative enactment. As appears from the quotations hereafter made there are too many rulings of the Supreme Court of the United States and of other courts to the contrary to permit the statement from 3 Haw. 292, 295, just referred to, to stand as a correct enunciation of the law.

The statement quoted in the taxpayer's brief from 3 Haw. 297 was made by one only of the justices. As

above stated, the only property under consideration in that case was money and goods which were in the United States and Europe. What Mr. Justice Hartwell said relating to household furniture, family relics and non-negotiable notes and securities, was clearly *obiter dictum.* Not only was his statement not an announcement of the view of the full court, but it has not the force of even an actual decision or actual opinion by one justice.

The other Hawaiian case cited on the subject is that of *Hackfeld vs. Luce,* 4 Haw. 172. In that case the statute imposed a tax on "all personal property of whatever kind" and, as the court said, "the same section proceeds to illustrate what is personal estate, as follows:

"The term personal property shall be construed to include all household furniture, goods and chattels, wares and merchandise, all ships and vessels, whether at home or abroad, all moneys, *notes of hand, unsecured debts,* growing crops, public stocks, stocks in corporations, and every species of property not included in real estate." The court said that "though a personal tax cannot be assessed against a non-resident, nor can the property of a non-resident be taxed unless it has an actual situs within the jurisdiction, so as to be under the protection of its laws, it is quite competent for any government to provide that any tangible personal property situated within its jurisdiction may be taxed there irrespective of the residence of the owner."

With this statement of principles no fault it is to be found. As has been above stated, the State can reach the tangibles within its Territorial limits whether the owner be a resident or a non-resident

and can also tax a resident and measure his ability to pay by the income which he receives from property elsewhere. The court held that certain debts payable to residents, secured by mortgages on real and personal property in the kingdom, and also certain other debts payable to persons not resident in this kingdom for which non-residents the local taxpayers were agents, some of which latter securities ran in the name of the local taxpayers themselves though held for account of their absent principals, were personal property within the kingdom. As to the debts due to Hackfeld & Co., the local taxpayers, there could have been no doubt whatever that they were personalty in Hawaii and taxable here. As to the securities held by Hackfeld & Co., as agents for the persons in Germany the court ruled that the language of the then existing statute was such as to show that the legislature intended to tax those also; and in doing so held that the maxim mobilia sequuntur personam could be departed from. If by that reasoning the court meant that the maxim could be applied or disregarded in the *sole discretion of the Court,* it is submitted that the ruling was against the great weight of authority and against the view of the Supreme Court of the United States as quoted in this brief. If, on the other hand, by that reasoning the court meant that our statute, as construed by it impliedly repealed the maxim for the purposes of the taxation thereby imposed, the ruling is one that is immaterial in the case at bar. Each statute

has to be considered upon its own merits and with reference to its application to the particular state of facts in hand.

The court said, among other things: "It is true that the mere right of a foreign creditor to receive from his debtor within the state, payment of his demand cannot be subjected to taxation, for this is a right personal to the creditor where he resides. The creditor cannot be taxed in the debtor's hands for they are not his property in any sense. They are the obligations of the debtors and possess value only in the hands of the creditors." But the creditors in the cases at bar are within the jurisdiction and can be taxed. They receive from the Territory security and protection. They can properly be called upon to help bear the expenses of government.

The decision in the *Estate of Hall,* 19 Haw. 531, related to inheritance taxes and the applicability of the maxim was not there in issue. "The fiction that personal property has its situs at the domicile of the owner *is not relied on,* as it is conceded that the act covers personal property of a non-resident which is tangible and is physically situated within the Territory." Page 533. The description in the act of the property thereby made taxable included "all personal property within or without the Territory." The court held that this description "includes intangible as well as tangible property" and certainly the expression "within or without the Territory" was unambiguous and left no room for construction.

THIS COURT WILL FOLLOW THE INTERPRETATION PLACED BY THE SUPREME COURT OF THE TERRITORY ON THE DECISIONS OF THE SUPREME COURT OF THE HAWAIIAN ISLANDS.

But there is a further reason for this Court to hold that the cases of *Hackfeld & Co. v. Minister of Finance,* 3 Haw. 292, and *Hackfeld & Co. v. Luce,* 4 Haw. 172, and *Estate of Hall,* 19 Haw. 531, did not reject the maxim *mobilia sequuntur personam* as a principle of law. The Supreme Court of the Territory, in the case at bar, interpreted the decisions in those cases in the following language: (Record, p. 46).

"The further point is made by counsel for the taxpayers that the local Supreme Court in the three Hawaiian cases *supra* has repudiated entirely the maxim mobilia sequuntur personam, but with this we cannot agree. Some of the expressions made use of would perhaps lead to that inference, but after a careful review of those opinions, taken in the light of the law and facts involved, we conclude that the most that ought to be said of them is that the Court merely intended to hold, as the Supreme Court of the United States has since held in Maguire v. Trefry, *supra,* that the maxim is not of universal application and may yield to the exigencies of particular circumstances."

As this court will consider the interpretation by the Supreme Court of the Territory of the decisions of the Supreme Court of the Hawaiian Islands binding upon the Federal Court, the foregoing discussion by the Supreme Court of the Territory of those

earlier Hawaiian cases should be conclusive in this cause of the intent and purpose of the Supreme Court of the Kingdom in the language used in those early cases.

"The appellant and the appellee differ as to the purport and meaning of these two decisions of the Supreme Court of the Hawaiian Islands, but we consider the decision of the Supreme Court of the Territory in the case at bar a final determination of the law of the Territory which is binding on this Court."

Territory of Hawaii v. Hutchinson Sugar Co., 272 Fed. 856, 859.

COMPARISON WITH OTHER LEGISLATION.

Intangibles have been considered appropriately taxed under a provision for taxation of such property "in" the state, even when physically absent, in many of the states.

Westinghouse Electric & Mfg. Co. v. Los Angeles, Cal., 205, Pac. 1076.

Dwinnell v. Gaylord, 73 Wis. 316.

Anderson v. Durr, Ohio, 126 N. E. 57, aff'd on certiorari (U. S.) Adv. Ops., 42 Sup. Ct. 15.

THE MAXIM MOBILIA SEQUUNTUR PERSONAM APPLIES TO TAXATION OF INTANGIBLE PERSONALTY IN THE ABSENCE OF LEGISLATION PRESCRIBING A CONTRARY RULE.

The maxim *mobilia sequuntur personam* is a familiar one. It has been recognized and applied by courts and text-writers so long that the memory of man runneth not to the contrary. It means that movables follow the owner, that personalty is to be

deemed to have its situs at the domicile of the owner, that it is to be deemed to be at the owner's domicile. Bonds, notes and bank deposits are credits in the hands of the owner, or depositor, as the case may be. The transactions disclosed by the existence of a bond, note or of a bank deposit are simply loans made by the holder or depositor to the entity issuing the bond or note in the one case, and to the bank in the other case. From these transactions credits arise which are property in the hands of the creditor and not of the debtor. If the papers, which we call bonds and notes, are burned or otherwise destroyed, the credits are not destroyed. They still continue in existence and enforceable in favor of the creditor. If the certificate of deposit or the bank book, if there is any, is burned or otherwise destroyed, the credit in favor of the depositor continues to exist and to be enforceable. In the event of the destruction or loss of the papers, the kind of evidence to be resorted to in order to prove the existence of the credit may be different. It may be what lawyers call secondary evidence, but the credit will nevertheless be provable and in existence. The bonds and the bank book or certificates, when they are used, are merely one form of evidence of the fact and the existence of the credits. These credits being intangible have no actual visible situs of their own. The maxim, which sometimes is called a fiction, is peculiarly appropriate in such a case. The credit would naturally be thought of as having its existence with the creditor

at his domicile. At the other end, with the debtor, is simply the debt, and the debt is not property in any proper sense of the term.

If this maxim applies in the case at bar, the bonds, notes and the deposits under consideration are property in Hawaii. But the taxpayer says that it should not be applied in this case because, as it says, it was intended to effectuate justice and is generally disregarded in taxation matters. Its whole brief seems to be based upon this theory and the claim that after a considerable history of gradual, judicial development or curtailment,—whichever may be the proper term—the maxim is now generally disregarded *by courts at their option* in taxation matters. We respectfully take issue directly with the thought and the contention that *courts* are at liberty to apply or to refuse to apply the maxim in taxation matters in their discretion, and submit that in the absence of legislation to the contrary the maxim *must* be applied. There are, indeed, some cases which support the contention of opposing counsel upon this particular point; but it is submitted that the weight of authority and of reason is the other way. The maxim is a principle or rule of law and has been often so referred to by courts. A few examples will be here given.

"This objection is based upon the general rule of law that personal property, as to its situs, follows the domicile of its owner."

Taylor v. Secor, 92 U. S. 575.

In the same page and paragraph of the case just cited, the court refers to it as a *law*:

"Like all other *laws* of a state, it is therefore subject to legislative repeal, modification or limitation."

Cooley speaks of the maxim as a general rule. Cooley's Taxation (1876), pages 269, 270. So does the Court in

Providence Institution v. Boston, 101 Mass. 575, 582.

Danville v. Parks, 88 Ill. 170, 173.

New Orleans v. Stempel, 175 U. S. 309, 313.

Pullman Company v. Pa., 141 U. S. 19, 27.

Neither in matters of taxation nor in any other class of cases should it be left to the discretion of courts to apply or to brush aside this principle. In matters of taxation the result would be that it would be left to the courts to decide, as did the court in *Poppleton v. Yanhill,* 18 Or. 377, 382, whether the imposition of a tax upon certain classes of property would be just or unjust. "I can discover no justice whatever" in the alleged taxation, said the judge in that case; and for that reason the maxim was there disregarded. Economists and other able-minded men often differ as to the harshness and injustice or the justice of certain tax laws. If those laws do not violate certain constitutional limitations upon the power of the state, the courts have uniformly held that the laws are valid and that it is for the Legislature alone to say whether it shall tax doubly, for example, or with some degree of harshness or severity or whether it shall make certain broad classifica-

tions of the subjects of taxation, leaving out others from the operation of the tax. Questions such as these are always for the Legislature alone and not for the courts to determine. The maxim has been too long recognized as a principle of law to be now disregarded in the absence of a legislative command.

"Personal property, in the absence of any *law* to the contrary, follows the person of the owner, and has its situs at his domicile. But, for the purposes of taxation, it *may* be separated from him and he may be taxed on its account at the place where it is actually located. These are familiar principles and have been often acted upon in this Court and in the Courts of Illinois."

> *Tappan v. Merchants' National Bank,* 19 Wall 490, 499.

Here is a statement, directly upon the point, by the highest court in our land. The word "law" there used is unambiguous. It means a law passed by the legislature. If there is no such law to the contrary the court says personal property does follow the person of the owner and does have its situs at his domicile. And when the court says that for purposes of taxation it may be separated from him and may be taxed, the court, of course, means that it may be separated by the legislature. "There is no doubt of the *legislative* power to modify the rule of comity, mobilia personam sequuntur, in many respects." *New Orleans v. Stempel,* 175 U. S. 309, 313. Why talk about legislative power if the courts of themselves can adopt or reject the rule as they please?

Referring to this rule,

"Like all other laws of a state, it is, therefore, subject to *legislative* repeal, modification or limitation; and when the Legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation. Whether allowing the rule to stand as to taxation of individuals, and changing it as to railroads or other corporations, it violated the rule of uniformity prescribed by the constitution of the state, we will consider when we come to the constitutional objections to the statute."

Taylor v. Secor, 92 U. S. 575.

The same comment applies here as was made with reference to the last case. It is to be further noted from this quotation from the Taylor case that the legislature may desire to leave the maxim intact as to certain matters of taxation and to repeal it or modify it as to certain other matters of taxation, as was done by the legislature of Illinois in the Taylor case.

"But, for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner *by the law of the placc* where it is found."

Pullman v. Pa., 141 U. S. 19, 29.

To the same effect is *Marye v. Railroad,* 127 U. S. 117, 123.

In *Bristol v. Washington County,* 177 U. S. 133, 144, the court quoted with approval the statement from *New Orleans v. Stempel,* supra, that the *law* might separate shares of stock from the persons of their owners for purposes of taxation and give them a situs of their own.

Cooley (Taxation, 2nd Ed., page 23) says that "the *state* may give the shares of stock held by individual stockholders a special or particular situs for the purposes of taxation and may provide special modes for the collection of the tax levied thereon" and that "it is often convenient as well as perfectly just to take that course."

He certainly means that the state, through the *legislative* instrumentality, may do these things. It is for the state and not the courts, we submit, to say in any particular case whether it is "convenient as well as perfectly just" to repeal or to modify the principle.

"Since shares of stock in a corporation in the hands of the individual stockholders are personal property, even when the corporation owns land, their situs for the purposes of taxation is the residence of the owners or holders within or without the state, as the case may be, *unless there is express statutory provision to the contrary.*"

7 *Fletcher Cyc. Corp.,* Sec. 4623.

Speaking of a share of stock,

"It is of that class of property that its situs for purposes of taxation is a matter of *legislative* control."

Denver v. Hobbs Est., 58 Colo. 220, 224.

After discussing the nature of a share in a corporation,

"From this it would seem to result necessarily, *that its situs,* for purposes of taxation, *when not otherwise provided by statute, is that of the domicile of the owner.* That shares of stock may be separated from the person of the owner, *by statute,* and given a situs of their own was held in *Tappan v. Merchants'*

Bank, 19 Wall. 490. *But when not so separated, that their situs follows* and *adheres to the domicile of the owner* is supported by a great weight of authority.

* * * * *

"The same principle governs a chose in action for purposes of taxation. Its situs is that of the domicile of the owner, although the debt is secured by a mortgage upon the realty in another state."

Bradley v. Bauder, 36 O. St. 28, 35, 36.

Referring to bonds and notes,

"Such mere credits have no other situs than the domicile of the owner, unless made so by statute * * *. *When, as here, there is an absence of any statute prescribing a different rule* * * * *the debt has its situs at the residence of the creditor* and may be taxed there. This ruling is certainly supported by the great weight of authority."

Dwinnell v. Gaylord, 73 Wis. 316, 324, 325.

"Intangible property, like stock, must always follow the domicile, unless separated from it by *positive law."*

Howell v. Cassopolis, 35 Mich. 471, 473, 474.

"A share of stock in a corporation is personal estate *and in the absence of any statute to the contrary* is *taxable to the owner* as other personal estate, *at the place of his residence,* whether the corporation be foreign or domestic."

Greenleaf v. Board, 184 Ill. 226, 228.

"The situs of such intangible property as shares of stock is the residence of the owner, when the contrary is not declared *by statute."*

Ogden v. St. Joseph, 90 Mo. 522, 529.

To the same effect are *Providence Institution v. Boston,* 101 Mass. 575, 582; and *Danville v. Parks,* 88 Ill. 170, 173.

The later Kansas cases—which repudiate the early rule set forth in the Kansas cases cited by plaintiff-in-error—accept this doctrine of the law.

"In the absence of specific legislation, debts evidenced by notes and mortgages are ordinarily taxed at the domicile of the owner."

Kimball Co. v. Shawnee County, 99 Kan. 302.
Freedom Twp. v. Douglas, 99 Kan. 176.

It is submitted that the principle in question must be applied in this case unless there is a statute to the contrary. Hawaii has no statute expressly saying that the maxim is not law here either with reference to taxation matters or to any other subject. Nor have we any statute indirectly making this declaration, unless it be the very tax statute now under consideration. The latter, it is submitted, has no such provision and can have no such effect. The expression, *property in Hawaii,* in Secs. 1305 and 1306 is capable of including everything that is property in Hawaii because it is *physically* here and everything that is property in Hawaii by virtue of the maxim, —subject only to the limitations of Hawaii's taxing power.

IN ANY CASE NO BUSINESS SITUS OF THE INTANGIBLES IN THE INSTANT CASE IS SHOWN OUTSIDE OF THE TERRITORY.

But if this Court feels that the maxim mobilia sequuntur personam may be rejected in any given case, if a "business situs" is established for securities in a state apart from the residence of the own-

er, it is submitted on behalf of the Territory that the decision of the Supreme Court of the Territory of Hawaii was still correct, for no business situs in California was established for these securities.

In the event of failure to establish a business situs elsewhere, personal property, whether tangible or intangible, has its situs at the domicile of the owner.

Anderson v. Durr, Adv. Ops., 42 Sup. Ct. 15, 17.

In order then to justify plaintiff-in-error's claim that these securities (bonds, notes, and bank deposits) are exempt from taxation under the Hawaiian taxing statute, they must be shown to have established a business situs outside of the Territory of Hawaii, that is, in California, where the evidences of the debt were physically present. The Territory does not for an instant admit that even were such business situs established, that these securities would be relieved from the operation of the Hawaiian statute (*Anderson v. Durr,* supra), but it is urged that if such situs is not established, the case of the plaintiff-in-error must necessarily fail.

It is proper then at the outset to inquire what characteristics marked the physical presence of these securities in California that would justify a declaration that they had acquired a business situs in that state; and further what circumstances in connection with mere physical presence of intangibles in a state other than that of the owner's domicile constitutes a business situs.

THE CIRCUMSTANCES CHARACTERIZING THE PRESENCE OF THE INTANGIBLE PROPERTY IN QUESTION IN CALIFORNIA.

The submission (Record, p. 7-8) shows that Ewa Plantation Co. has a general agent in Honolulu, and that this general agent has in turn an agent, Welch & Co., in San Francisco. That Welch & Co. has during twenty years received the money paid for Ewa Plantation Co.'s sugar, which is sold on the mainland, and has deposited this money in California banks, crediting the amount on its books to the Honolulu agent for account of Ewa Plantation Company. That Ewa Plantation Co. has drawn from time to time against this credit as needed moneys required by it for the payment of the expenses of its plantation and dividends upon its stock; that all the bonds and notes were purchased by Welch & Co. for the account of Ewa Plantation Co. with surplus moneys of the latter so held, and the bonds and notes until they were sold on the mainland, *remained on deposit* with said Welch & Co. and none of said bonds and notes, or the proceeds with which they were purchased have been held in the Territory of Hawaii, nor have they been physically present therein at any time. Exhibit "B" (Record, p. 23) shows what these securities were, and the income from the bank deposits.

What are the significant things in this statement of facts? There is much that has no bearing on the matter at issue and is confusing so that should be

rejected at once. The receipt and disposition of the funds resulting from the sale of the sugar cannot qualify the agency regarding the notes, bonds, and deposits, for those funds being the proceeds from the sale of movable property (sugar) produced in Hawaii were subject to the income tax; and this has not been questioned. The drawing by Ewa Plantation Co. against the credit described above *may* be significant as bearing upon the business situs of the bank deposits. But the two vitally significant matters of fact in the submission are, first, the simple purchase by Welch & Co. of the bonds and notes in question, and the deposit of these securities with them until sold; and, second, the fact that the deposits in the California banks *must* have been in the name of Ewa Plantation Co. If they had not been, they would have been returned by the tax-payer, not as deposits in the Canadian Bank of Commerce and in the Wells Fargo Nevada National Bank (Record, p. 23), but as credits with Welch & Company.

What then was the control over these securities by the California agent of Ewa? First, it must be noted that Welch & Company was an "agent," not a "general agent," as was Castle & Cooke, Limited, in Honolulu (Record, p. 7); second, funds were deposited in California banks (credited on the books of Welch & Co. to Castle & Cooke, Ltd., for account of Ewa), apparently, from Exhibit "B," (Record, p. 23) in the name of Ewa, and against this credit, Ewa drew whenever it needed funds; third, the bonds and

notes were purchased by Welch & Co. for Ewa—possibly upon the most specific and minute directions—and remained on deposit with Welch & Co. until sold (it does not appear through whom).

It is urged that here is no showing of any but the most limited agency in respect of these securities. The taxpayer, it must be presumed, has stated its case as strongly as possible in this respect in the Submission. It says that it had an agent in Honolulu, Castle & Cooke; that Castle & Cooke had Welch & Co. in San Francisco as its agent; that the sugar produced by the taxpayer has during the period referred to been sold on the mainland and the proceeds have been received by this California agent and credited on its books, "to Castle & Cooke, Limited, for account of said Ewa Plantation Co.," and that "against * * * said credit" the taxpayer "has drawn from time to time as needed moneys required by it for the payment of the expenses of its plantation and dividends upon its stock"; that the bonds, and notes were purchased by the agents "for the account of" the taxpayer "with surplus moneys of the latter so held" by the agent; that the bonds and notes thereafter, until they were sold on the mainland, "remained on deposit" with the agent "and none of said bonds or notes or the proceeds from which they were purchased have been held in said Territory nor have they been physically present therein at any time." Not a word is said in the submission about the existence of a power of attorney. The presump-

tion under the circumstances must be that there was none. Not a word is said in the submission as to any power, even orally or by informal writing communicated by the taxpayer to the San Francisco agent, having been vested in the latter to do anything other than to purchase the bonds and to hold them subject to the order of the taxpayer in Hawaii. Nowhere does it appear that any power was given to the San Francisco agent to invest or to reinvest or to purchase or to sell without the direct command or prior approval of the Hawaiian owner, or even to collect the interest thereon. On the contrary, it does appear expressly that these moneys, as *written on the books of the San Francisco agent,* were held not to the credit of the agent, but to the credit of the Hawaiian taxpayer. It further appears expressly that these moneys so credited in San Francisco in the very name of the Hawaiian taxpayer were drawn upon by the taxpayer itself, and not even by Castle & Cooke in Honolulu. All this means, if it means anything, that the Hawaiian taxpayer throughout the whole of the period in question retained a very direct and complete control of these credits and securities *in itself* in Hawaii.

It matters not how long the arm is which reaches out from the place where the owner is and which holds the credits or securities. It matters not whether the securities are in a room adjoining that in which the owner is or are (the owner being in Honolulu) in Hilo or are in California. If discretion ex-

ists at all in the court to depart from the maxim that intangibles are where the owner resides, then certainly the fact that the owner retains a very real and complete control of his intangibles, allowing his agents no discretion in the matter, should prove to be a controlling factor. Suppose, for example, that the physical evidence of these credits (bonds and notes) are in the safe deposit box of the Trent Trust Company on Fort Street in Honolulu, the owner doing business on Hotel Street and retaining the only key to the box. His control is complete. Suppose that, instead of being in the Trent Trust Company's box, the securities, with the owner in Honolulu, are in a box of a safe deposit company in San Francisco with the only key in the possession of the owner in Honolulu. The control would be no different. Suppose that in the last case the key is in the hands of an agent in San Francisco with instructions to do with the securities only as the owner shall dictate. That control is still the same in principle. And lastly, it can make no difference that the bonds are in the offices of the agent himself and not in those of a safe deposit company in San Francisco.

The submission says that the bonds and notes were purchased by the San Francisco agent for the account of the taxpayer, but it does not say that the agent in San Francisco ventured to make these purchases or did make them without the direct instructions of the taxpayer. The submission does say that the bonds and notes were all of the time physically

in the possession of the San Francisco agent, but it does not say that this agent had any power over them, except to protect them physically.

The application of the maxim is peculiarly appropriate in the case at bar. The deposits in the bank are not shown to have been physically evidenced in any way, but, even assuming that they were, neither they nor the credits which were evidenced by the papers called bonds had in themselves any physical existence. They are intangible things. The money itself which was deposited became the property of the bank. The transactions in those cases were in effect loans to the bank. The lenders thereafter held mere credits. Those deposits certainly have no actual situs anywhere. The maxim very properly says that they must be deemed to be where the owner has his domicile. The case of the bonds is but little different. The mere presence of physical papers in San Francisco, under the circumstances above enumerated, is insufficient to give the credits a locality there. Suppose the bonds were all burned or otherwise destroyed thereafter, they would have no physical being of any kind. Would the maxim not apply one day and apply the next? Suppose that one-half of the bonds were burned and that one-half were not burned. Would the maxim apply as to one-half and not as to the other? Or would the taxpayer in those cases invent another maxim or fiction that "once in San Francisco, always in San Francisco?" This analysis shows that the taxpayer's contention is un-

tenable and that the enforcement of the maxim is most appropriate in the case at bar.

THE SECURITIES IN QUESTION HAD NOT ACQUIRED A BUSINESS SITUS FOR PURPOSES OF TAXATION IN THE STATE OF CALIFORNIA, AND THEREFORE THEIR ONLY SITUS WAS AT THE OWNER'S DOMICIL IN HAWAII.

Even though the securities in question had acquired a business situs in California, such as would render them liable to taxation there, still that would not deprive the Hawaiian Government of jurisdiction to tax their income here, as income arising from property "in" Hawaii.

Anderson v. Durr, supra.
Union Transit Co. v. Kentucky, 199 U. S. 194.
Hawley v. Malden, supra.
Blackstone v. Miller, 188 U. S. 189.

But if they had not established a business situs in California which would render them liable to California taxation, then they must necessarily have their situs at the domicil of the owner.

Anderson v. Durr, supra.

What then is required to establish a business situs in California? That question has been settled in numerous California cases. The physical presence of the securities in the state is not enough. They must be

"in the possession and control of a local agent who holds them for the purpose of transacting a permanent business, and of investing and reinvesting the

proceeds from the principal or interest in such manner that the property or credits came in competition with the capital of the citizens of the state in which the agent resides."

Mackay v. San Francisco, 128 Cal. 678.
Estate of Fair, 128 Cal. 607.
Stanford v. San Francisco, 131 Cal. 34.

Thus, in a recent case holding that solvent credits of a foreign corporation arising from sales on credit contracted through a sales agency within the state, were incidental to the business of the foreign corporation at its domicil, and not "property in" the State subject to taxation, the court said:

"If we may venture to formulate a general statement of this modification of the rule" (mobilia sequuntur personam), "it would be that this can only result where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicil, so that the substantial use and value primarily attach to and become an asset of the outside business. *In other words, while the non-resident may own the business, the business controls and utilizes in its own operation and maintenance the credits and income thereof.*"

Westinghouse Electric and Mfg. Co. v. Los Angeles Co., Cal. 205 Pac. 1076.

Thus, a general deposit to the credit of a domestic corporation in a bank in another state is subject to taxation at the domicil of the corporation as being present in California.

Pacific Coast Sav. Society v. San Francisco, 133 *Cal.* 14.

Securities physically absent from the state are taxable in the state as present there when the owner is there, when they are not being used in some business in the state in which they are physically present.

Mackay v. San Francisco, supra.

Estate of Fair, supra.

It is submitted that all that is necessary, under these authorities, to show that the securities in the case at bar had no taxable business situs in California under California law is to examine the facts set forth in the Submission (Record, pp. 7-8). All that is there shown is that the securities were purchased and held by Welch & Co. in California for Ewa. There is nothing to show that the purchase and holding were not a purely ministerial agency. It was exactly the sort of thing that is done many hundred times a year in Hawaii by a large number of citizens, —the writing to a broker of instructions to buy certain securities, and hold them until further orders are received, either to forward the same to Hawaii, or to sell them. It is true in this case, that the securities were not forwarded to Hawaii, but were sold,— apparently from the Submission, *not* by Welch & Co..—but that does not transmute the transaction from one of pure brokerage to one where the securities were utilized in a California business so as to bring the credits into competition with the capital of the State and give them a business situs there. Their situation remained exactly the same as though Ewa had forwarded a check to some San Francisco broker

with instructions to purchase these securities; had then had them forwarded to Hawaii, and later had sent them back to a California broker and had them sold.

There was, from the Submission, apparently no general agency in Welch & Co. with regard to these securities; it is not even shown that the California concern had authority to cut the coupons and collect the interest, or that it did so, much less to invest the interest or to change the capital investment, and re-invest, with a general control over the investments. It is submitted, therefore, that there is nothing to distinguish this from an ordinary brokerage tranc-action, and that the California authorities them-selves decline to stamp these securities with a busi-ness situs in California.

THE CASES CITED BY PLAINTIFF-IN-ERROR ANALYZED.

The cases cited by plaintiff-in-error to establish the proposition that the securities before the court had a business situs in California fall roughly into two classes; those that are irrelevant; and those that declare that the maxim mobilia sequuntur per-sonam yields to the fact of *actual control* elsewhere, —that is, such a localization of the securities in the business of the foreign state that they enter into competition with the capital employed in business in that state by its own citizens. With this last proposition, the Territory has no particular quarrel, if it be determined by the court that the maxim is

not what is contended by the Territory,—a rule of law variable only by specific legislation. We have attempted heretofore to show,—and shall later deal with the problem again,—that even under the cases on this last point cited by plaintiff-in-error, there is always present that element of localized general control, the power to invest and reinvest at the discretion of the agent, that at once distinguishes the cases cited from the case at bar, where there was only a "deposit" (Record, p. 7) of the securities in California.

CASES CITED BY PLAINTIFF-IN-ERROR WHICH ARE NOT IN POINT.

On the proposition that the taxable situs of notes, bonds, mortgages and the like, being in themselves property, is, in the absence of express statutory direction, the place where they are found, plaintiff-in-error, cites a number of cases. The first three are Kansas cases. Of *Blain v. Irby,* 25 Kan. 499, it is sufficient to say that this case did not deal with the proposition at all, and merely referred with approval in passing to the other two Kansas cases cited by Ewa, *Wilcox v. Ellis,* 14 Kan. 588, and *Fisher v. Commissioner of Rush County,* 19 Kan. 414.

The Territory is perfectly content to submit these cases to the court with the interpretation given them by recent Kansas cases. For instance, *Johnson County v. Hewitt,* 76 Kan. 816, 14 L. R. A. (N. S.) 493, cited by plaintiffs-in-error on what constitutes a

business situs,—and which the Territory will cite in support of its own contentions, later,—says:

"Although much confusion still exists, legal thought upon the subject of the taxation of intangible property has been considerably clarified since the opinions in Wilcox v. Ellis, and Fisher v. Rush County were written, and many of the arguments there advanced would now be regarded as unsatisfactory."

In the very recent case of *Kimball Co. v. Shawnee County,* 99 Kan. 302, where the Court held that the maxim applied except where modified by the Legislature, the case of Fisher v. Rush County was again referred to as having been twice disapproved by the Kansas court.

In the case of *Poppleton v. Yanhill,* 18 Ore. 377, the decision of the court was based upon the interpretation of the local statute. The question was whether notes and mortgages for money loaned in Washington, and which were held in Washington by an agent were taxable in Oregon. The court said:

"Section 2731, Annotated Code provides that 'the terms "personal estate" and "personal property" shall be construed to include all household furniture, goods, chattels, money and gold dust on hand or on deposit, either within or without this state; all boats or vessels, whether at home or abroad, and all capital invested therein; all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage or otherwise,' which is the only provision from which it could possibly be inferred that the property in question might be taxable in this State * * *. The clause relating to debts due or to become due, etc., was evidently intended to include domestic debts only, as it does not declare, like the

other two clauses, that it includes debts due from parties 'either within or without this State' or 'at home or abroad,' or contain terms of equivalent import. *Leaving out of the latter clause the qualifying words referred to, after having inserted them in the two former ones, would indicate, on the part of the Legislature, an intent not to include debts due from parties living out of the State* as 'personal property' or 'personal estate,' and authorize the construction indicated. The first clause of the section would include property like that in question, if it had not limited the construction to articles 'on hand or on deposit.' The property in question was neither 'on hand or on deposit,' but was in the hands of the appellant's agents in Washington Territory, invested by them and under their control."

In People ex rel *Jefferson v. Smith,* 88 N. Y. 576, the decision was based upon a construction by the court of various statutes indicating an intent on the part of the Legislature to change the rule that personalty follows the domicil of the owner. In arriving at that conclusion, the court considered Revised Statutes, as amended by Chapter 176, Laws 1851, where it was provided that every person shall be assessed where he resides for all personal estate owned by him, *including all personal estate in his possession or under his control;* Chapter 371, Laws 1851, where it was provided that *all debts owing by residents to non-residents* of the United States for purchase of real estate *were personal property to be taxed where the debtor resided;* Chapter 37, Laws 1855, where all persons and associations doing business * * * in New York and not residents were to be assessed and taxed on all sums invested in any

manner, just as if they were residents; Section 428, Code of Civil Procedure, where it was provided that *a debt evidenced by a bond, promissory note, or other instrument for payment of money, whether the debtor was resident or non-resident, should be regarded as personal property as the place where the instrument was found,* for the purpose of giving jurisdiction to the Surrogate.

It is submitted that these cases, in which the maxim was departed from under the construction of local statutes indicating that the legislature had intended to supplant the rule, are not authorities in the present case.

In the two Kentucky cases of *Commonwealth v. West India Oil Refining Co.*, 129 S. W. 301, and *Commonwealth v. Avery,* 174 S. W. 519, cited by plaintiff-in-error, the decision was directly based upon the fact that the property could be taxed outside of the state, and therefore the jurisdiction of Kentucky to tax did not exist. The Territory believes that it has demonstrated that the securities in the case at bar were not taxable in California, but if they were, the ruling of the Kentucky court is one which the Supreme Court of the United States has repeatedly decline to make.

Anderson v. Durr, supra.
Hawley v. Malden, supra.
Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54.
Union Transit Co. v. Kentucky, supra.
Blackstone v. Miller, supra.

IN ALL OF THE CASES CITED BY THE PLAINTIFF-IN-ERROR WHERE THE MAXIM MOBILIA SEQUUNTUR PERSONAM WAS DISREGARDED THERE WAS A COMPLETE BUSINESS CONTROL OF THE SECURITIES IN THE STATE FOREIGN TO THE OWNER'S DOMICIL, AND OFTEN SPECIFIC STATUTES CHANGING THE RULE.

In *Blackstone v. Miller,* 188 U. S. 189, the court held that a succession tax could be levied on certain intangible property *both* in the state where it was actually present, and in the state where the owner had lived and died.

In *New Orleans v. Stempel,* 175 U. S. 309, the statute of Louisiana expressly taxed the credits of nonresidents, which were derived from business done in the State. The Court held that this was a legitimate exercise of state *power,* clearly indicating that the maxim should generally apply, but might be modifiled by express legislation. In referring to *State Tax on Foreign Held Bonds,* 15 Wall. 300, the court said:

"This last sentence, properly construed, is not to be taken as a denial of the *power* of the legislature to establish an independent situs for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicil of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession."

And again in referring to *Kirtland v. Hotchkiss*, 100 U. S. 491, as not being in conflict with the decision, the court said:

"There was no legislation attempting to set aside the ordinary rule in respect to the matter of situs."

Bristol v. Washington County, 177 U. S. 133, and *Re Jefferson*, 35 Minn. 215, may well be considered in connection with *People ex rel, Jefferson v. Smith*, supra, for all three of these cases dealt with the securities of Jefferson, a resident of New York until his death, which securities were held, and *managed* in Minnesota. The credits were under the full control of the Minnesota agent for collection, investment, and re-investment, and the Minnesota Court held that this fact, particularly in view of the fact that these very securities had been held exempt from taxation in New York, in the Jefferson case, supra, were taxable in Minnesota. The Supreme Court of the United States held that their taxation by Minnesota was permissible, particularly emphasizing the control of the agent in Minnesota over them.

In the case of *Board of Assessors v. Comptoir D'Escompte*, 191 U. S. 388, the *power* of the State of Louisiana to tax credits arising from business done in the state by a non-resident was before the court, the statute expressly covering such credits. The court held that it could be done, and said:

"From these cases it may be taken as the settled law of this Court that there is no inhibition in the Federal Constitution against the right of the State to tax property in the shape of credits where the same are evidenced by rates or obligations held with-

in the State, *in the hands of an agent of the owner for the purpose of collection or renewal with a view to new loan, and carrying on such transactions as a permanent business.*"

In *Union Transit Co. v. Kentucky*, 199 U. S. 194, the power of the State to tax rolling stock of a domestic corporation which rolling stock was permanently located outside the taxing state was under discussion. The court held that the cars could not be taxed, and said:

"Respecting this, there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way in which he can be reached by process in a State other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases, the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and *to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also*, more particularly in the case of mortgages, *in the state where the property is retained.* Such has been the repeated rulings of this Court. *Tappan v. Merchants' National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Bonaparte v. Tax Court*, 104 U. S. 592; *Sturges v. Carter*, 114 U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; *Blackstone v. Miller*, 188 U. S. 189.

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, *either in the State of the domicil or the situs.*"

The case of *Liverpool, London & Globe Insurance Co. v. Board of Assessors for Parish of Orleans,* 221 U. S. 346, was another instance of the construction of the statute of Louisiana twice hereinabove referred to which taxed all credits arising from business done in the state by non-residents. The court again sustained the power of the State to do this and, quoting *Metropolitan Life Ins. Co. v. New Orleans,* 205 U. S. 395, said:

"We are not dealing here merely with a single credit or a series of separate credits *but with a business.*"

As to *Louisville & Jefferson Ferry Company v. Kentucky,* 188 U. S. 385, the Territory is content to allow the Supreme Court of the United States to dispose of it as an authority in the present case. In *Anderson v. Durr,* Adv. Ops., 42 Sup. Ct. 15, at 17, in holding that the Ohio Court was correct in taxing as personal property "in" Ohio, a seat on the New York Stock Exchange, even though that seat was also taxed in New York, the Ohio Court having declared that the property followed the person of the owner to his domicil in Ohio, the United States Supreme Court said:

"The asserted analogy to *Louisville & Jefferson Ferry Co. v. Kentucky,* supra, cannot be accepted. That decision related to a public franchise arising out of legislative grant, held to be an incorporeal hereditament in the nature of real property and to have no taxable situs outside the granting state. It did not involve the taxation of intangible personal property. See *Hawley v. Malden,* 232 U. S. 1, 11; *Cream of Wheat Co. v. Grand Forks,* 253 U. S. 325, 328."

Finally, the case of *De Ganay v. Lederer,* 250 U. S. 376, is cited by plaintiff-in-error. De Ganay v. Lederer is certainly the strongest case which plaintiff-in-error has cited against the Territory's claim, but it is submitted that this case is distinguishable. In the De Ganay case, not only were the securities physically present in Pennsylvania, and had their source there as debts, but they were actively entered in business competition with the capital of citizens of the state, for they were under the fullest control of the American agent. The court there, after expressly referring to the authority of the agent in Pennsylvania to sell, assign, or transfer any of the securities, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal, said:

"Thus situated and held, *and with the authority given to the local agent over them,* we think the income derived is clearly from property within the United States * * *."

It is submitted that there is the greatest distinction between this class of cases and the one at bar. In the cases cited by plaintiff-in-error, there was the fullest control of the credits and securities by an agent in the state foreign to the owner's domicil; the credits were localized in business and were subject to collection, sale, investment and reinvestment at the discretion of the agent; in the language of the California Court, the business in the state foreign to the owner's domicil "utilized and controlled in its own operation and maintenance the credits and in-

come thereof." (*Westinghouse, etc., Co. v. Los Angeles,* supra.)

Where was there such utilization and control of the securities here in question? There was none. They were merely purchased by Welch & Co. upon the order of the owners, and held by the California corporation as a naked depositary until, apparently again on the specific order of Ewa, they were sold. Here was no business, here was no collection, investment and reinvestment in competition with California capital and business. There was merely, in the words, of the Court in *Liverpool, Etc., Insurance Co. v. Board of Assessors, supra,* "a single credit," or at the most "a series of credits," and no business.

THE GRAND INGREDIENT IN "BUSINESS SITUS" IS CONTROL INDEPENDENT OF THE OWNER SO THAT THE SECURITIES ENTER INTO BUSINESS COMPETITION WITH THE CAPITAL OF THE CITIZENS IN THE STATE WHERE THE BUSINESS SITUS IS ESTABLISHED.

In the cases cited by the plaintiff-in-error, a business situs was held to have been established only when there was a local control of the securities,—a power to collect, sell, assign, invest and reinvest,—which brought the credits into business competition with the assets of the citizens of the State. In the absence of such control, there is no localization of the securities apart from the domicil of the owner;

the owner retains the business control of the securities, and their situs is necessarily at his domicil.

The Supreme Court of the United States has held that unless such local control exists, no business situs can be established.

"We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of the property within the state for taxation."

Buck v. Beach, 206 U. S. 392, 406.

A rather recent Kansas case, cited by plaintiff-in-error, holding that securities in the State merely for the purpose of safe-keeping were not taxable in the state, but had their situs at the domicil of the owner, used the following language:

"A merely transitory presence in a foreign state, or *naked interest for safekeeping is not enough."*

Johnson v. Hewitt, supra.

Kimball Co. v. Shawnee County, supra.

The control and use of the intangibles must result in what is, in effect, a separate business in the state foreign to the owner's domicil.

Westinghouse Electric & Mfg. Co. v. Los Angeles County, supra.

Where was the localized California control of the securities which would establish for them a business situs in California? The Submission (Record, p. 7) shows no competition with California capital. It shows nothing but the purchase,—under the specific order of Ewa, for all that appears,—of the securities,—and the possession of them,—still subject to

the orders of Ewa,—for purposes of safekeeping until they were sold. Even the sale does not appear to have been made by the California agent, or under its direction (Record, p. 7). It is submitted that nothing is established here but a "naked interest for safekeeping" in the California agent, which would have been equally well served by the deposit of these securities in any safety deposit vault. See *Johnson v. Hewitt,* supra. Surely, these circumstances do not establish a "business situs."

THE SECURITIES IN QUESTION WERE PROPERTY OWNED IN HAWAII, AND SO SUBJECT TO TAXATION UNDER THE HAWAIIAN STATUTE.

Intangible securities follow the person of the owner, and are thus taxable at his domicil.

Thus a seat on the New York Stock Exchange is entirely under the control of the officers of the Exchange in New York, is taxable at the owner's domicil in Ohio, as being personal property "in" Ohio.

> *Anderson v. Durr,* (Ohio), 126 N. E. 57, aff'd on certiorari (U. S.) Adv. Ops., 12 Sup. Ct. 15.

So, too, deposits in a bank in a state other than that of the owner's domicil are taxable at the owner's domicil.

> *Fidelity & Columbia Trust Co. v. Louisville,* supra.

> *Pacific Coast Savings Society v. San Francisco,* supra.

So stocks, bonds, mortgages, and other like securities are taxable at the owner's domicil though physically in another state.

Kirtland v. Hotchkiss, supra.
State Tax on Foreign-Held Bonds, supra.
Buck v. Beach, 206 U. S. 392.
Union Transit Co. v. Kentucky, supra.
Dwinnell v. Gaylord, 73 Wis. 316.
Estate of Fair, supra.
Mackay v. San Francisco, supra.
Johnson v. Hewitt, supra.

So, in the latest cases before the Supreme Court of the United States, both decided later than *De Ganay v. Lederer,* supra, on the taxation of intangible personal property, the Court has reaffirmed the doctrine that the general rule in such cases is that the property is to be taxed at the domicil of the owner.

Maguire v. Trefry, 254 U. S. 12.
Anderson v. Durr, supra.

But, of course, it is the contention of the Territory that these cases and all the others cited by the Territory are reconcilable with the De Ganay case, and others like it cited by plaintiff-in-error. The De Ganay case is different from the one at bar in that the securities there were in the absolute control for sale, assignment, investment, and reinvestment, of the agent in the United States. There was no such control in the case at bar, for here the agent in California had only a naked interest for safe-keeping. But even were this not true, the cases still do not conflict. The De Ganay case, and others of that variety, *did not hold that the securities were not also*

taxable, together with the income therefrom, at the residence of the owner also. Indeed, the Supreme Court of the United States in *Union Transit Co. v. Kentucky,* supra, and *Anderson v. Durr,* supra, must be taken to have established, not only that the income could be taxed by both California and Hawaii upon securities which might be regarded as in California by reason of having a business situs there, and as in Hawaii by reason of the maxim *mobilia sequuntur personam,* but that they would come within the term personal property "in" the place of the owner's domicil. (*Anderson v. Durr,* supra.)

It is respectfully urged upon the court that the Supreme Court of the United States has not held in any of the cases cited that intangibles are not in any event taxable at the domicil of the owner; that it has held repeatedly that they may be so taxed, even though they have acquired a business situs elsewhere, and are taxable at the place of the business situs (*Union Transfer Co. v. Kentucky,* supra, *Fidelity & Columbia Trust v. Louisville,* supra, *Anderson v. Durr,* supra); and finally that except where there is a localized general control apart from the residence of the owner, that they are not taxable save at the owner's domicil. (*Buck v. Beach,* supra.)

EVEN THOUGH THE SECURITIES HAD A BUSINESS SITUS IN CALIFORNIA SO AS TO BE SUBJECT TO TAXATION UNDER THE CALIFORNIA LAW, THEY WOULD STILL BE SUBJECT TO TAXATION IN HAWAII UNDER THE MAXIM *MOBILIA SEQUUNTUR PERSONAM.*

If the securities in question had acquired a situs for purposes of taxation in California they would still be taxable in Hawaii.

Anderson v. Durr, supra.
Union Transit Co. v. Kentucky, supra.
Blackstone v. Miller, supra.
Hawley v. Malden, supra.

Thus, in the Anderson case, the court held that a seat on the New York Stock Exchange was taxable at the domicil of its owner in Ohio, even though it had earlier held that a New York Stock Exchange seat was taxable as personal in New York (*Rodgers v. Hennpin County,* 240 U. S. 184).

In view of the authorities already cited to the effect that these securities would not be taxable in California, the Territory deems it not improper again to refer to the language of the Supreme Court of the United States in *Union Transit Co. v. Kentucky,* supra:

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicil or the situs."

Does the De Ganay case declare that the intangibles taxable in the United States are not also taxable as being present in France? It does not. Neither do any of the other Federal cases cited. The only ones that do are the Kentucky cases, and we submit that those have followed a fallacious theory of law that

has been repeatedly rejected by the Supreme Court of the United States in no uncertain terms.

THE FEDERAL COURT SUSTAINS LOCAL TAXATION WHEREVER POSSIBLE.

The Territory has already cited many authorities to the effect that this Court will sustain the ruling of the Territorial Supreme Court in construing the local tax statute, if that be at all possible.

But it is interesting to note how earnest has been the effort of the United States Supreme Court in cases cited by plaintiff-in-error to make no ruling that would exempt a large body of property from the taxation of the local government. Although the situation in a case arising in the territory and in a case arising in a state is quite different in the power of the reviewing court to reverse, yet the expediency of leaving the local construction of a tax law as the last word has been recognized in territorial as well as in state cases. It is, then, with a view to considering the attitude of the United States Supreme Court in sustaining local taxation that the Territory quotes the following:

"When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the State, the Federal courts should be slow to declare an exemption in advance of any decision by the courts of the State. The rule in such a case is that the Federal courts follow the construction placed upon the statute by the State courts, and in advance of such construction, they should not declare property exempt from taxation unless it is clear that such is the fact. In other words, they should not release any property

within the State from its liability to State taxation unless it is obvious that the statutes of the State warrant such exemption, or unless the mandates of the Federal Constitution compel it."

New Orleans v. Stempel, supra.
Board of Assessors v. Comptoir National D'Escompte, supra.

It is true that the Federal Court is not bound by the decision of the territorial court on a tax statute, as it would be by the decision of a state court. But it is submitted that the same logic should require an equal reluctance in this court to exempt property in a territory from taxation, as would apply were a state tax law involved, particularly when the local law has already been held by the local court to render the property in question subject to taxation.

IF THE CONCLUSION REACHED BY THE SUPREME COURT OF THE TERRITORY IN THE INTERPRETATION OF THE HAWAIIAN TAX STATUTE, AND ITS APPLICATION TO THE RETURN AND ASSESSMENT OF EWA PLANTATION, IS NOT SUCH AS MIGHT HAVE BEEN REACHED BY THIS COURT HAD THE MATTER BEEN BEFORE IT FOR AN INITIAL DETERMINATION, YET IT IS NOT SO CLEARLY ERRONEOUS AS TO RENDER NECESSARY A REVERSAL.

The Territory believes that the judgment of the Supreme Court of Hawaii in construing the strike receipts and the income received from intangibles present in California by Ewa Plantation Company

as falling within the taxation statutes of Hawaii was correct.

But were there some ambiguity in the statute; were the construction of and the conclusion arrived at by the Supreme Court of Hawaii, regarded with disfavor by this Court, as a conclusion that the members of this Court would have avoided had the matter come before them for its initial determination, still there is no such clear and obvious error as would justify this Court in disregarding the local construction of a local statute.

Copper Queen Mining Co. v. Board of Equalization, supra.

CONCLUSION.

The Territory urges that the strike receipts were clearly taxable for the year 1920 as income under the Hawaiian statute; that the return by the taxpayer of its contribution to that very fund as an expenditure chargeable wholly to 1920 is conclusive against the taxpayer's contention that the receipts should be charged as income for three separate taxation years; that the court will not disregard the plain terms of the taxation statute in order to permit the taxpayer to keep its books under any particular system, particularly when the system is inconsistent with the facts; that the Federal Court will be loath to overturn the local construction of a

local tax law; and that the judgment of the Supreme Court of the Territory of Hawaii should therefore be affirmed.

The Territory further urges that the income on the bank deposits, bonds and notes held in California was properly taxable as derived from property owned in Hawaii; that the maxim *mobilia sequuntur personam* applies in Hawaii except where modified by specific legislative enactment; that this Court should be governed by the interpretation of the Territorial Supreme Court in the case at bar of the early Hawaiian tax decisions; that even if a business situs may be established to vary the maxim, that it can only be done by a full and complete control apart from the domicil of the owner; that a naked deposit for safekeeping is not enough to establish a business situs; that the intangibles here involved have been shown as subject to no such control outside of Hawaii as would give them a business situs apart from the domicil of the owner; that in particular no business situs has been established that would be recognized by the California law; that even if the credits had a business situs in California, they would still be "in" Hawaii for purposes of taxation; that the Federal Court will be extremely loath to overturn the construction of the Territorial tax statutes by the Territorial Supreme Court, and particularly loath to do so in order to exempt a large class of property from taxation; and that the judg-

ment of the Supreme Court of the Territory should therefore be affirmed.

Respectfully submitted,

TERRITORY OF HAWAII,
Defendant-in-Error.

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